Paragon Pattern & Manufacturing Co., Inc. *and* William Russell. Case GR–7–CA–46022

June 25, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On December 9, 2003, Administrative Law Judge Keltner W. Locke issued the attached Bench Decision and Certification. The General Counsel filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Paragon Pattern & Mfg. Co., Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Within 14 days after service by the Region, post at its plant in Muskegon, Michigan, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 22, 2002.

"(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 25, 2004

Peter C. Schaumber,	Member
Dennis P. Walsh,	Member
Ronald Meisburg,	Member

(SEAL) NATIONAL LABOR RELATIONS

A. Bradley Howell, Esq., for the General Counsel.
Robert A. Dubault, Esq. (Warner, Norcross & Judd, L.L.P.), of Muskegon, Michigan, for the Respondent.
Mr. William Russell, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on November 4 and 5, 2003, in Grand Rapids, Michigan. After the parties rested, I heard oral argument, and on November 7, 2003, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, Remedy, Order, and Notice are set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

[1] In light of our disposition of this matter, we find it unnecessary to rule on the Respondent's motion for leave to file an answering brief out of time.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening employees with reprisals or loss of employment because they opposed contract concessions sought by the Respondent in collective bargaining with the Union.

[1] The bench decision appears in uncorrected form at pages 472 through 489 of the transcript (also designated p. 5 to 22 of the transcript for November 7, 2003). The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B. These actions include posting of the notice attached as Appendix A to this Certification of Bench Decision.

CONCLUSIONS OF LAW

1. The Respondent, Paragon Pattern & Mfg. Co., Inc., Muskegon, Michigan, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all times material to this case, the Union, Local Lodge PM 2848, International Association of Machinists and Aerospace Workers, AFL–CIO, has been a labor organization within the meaning of Section 2(5) of the Act, and the exclusive bargaining representative of the following appropriate unit of Respondent's employees: All journeymen pattern makers and their apprentices employed by Respondent, excluding sole proprietors, bona fide partners, and managers in a supervisory capacity, and all other employees. The Union and Respondent are parties to a collective–bargaining agreement pertaining to these employees, which is effective by its terms from June 1, 1999 through May 31, 2004.

3. On or about November 22, 2002, Respondent violated Section 8(a)(1) of the Act by threatening employees with reprisals and loss of employment because they opposed ratification of concessions negotiated by Respondent and the Union.

4. The unfair labor practices described in paragraph 3, above, are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not violate the Act in any other manner alleged in the complaint.

On the findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[2.]

ORDER

The Respondent, Paragon Pattern & Mfg. Co., Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals or loss of employment because they opposed concessions sought by Respondent in collective bargaining with the Union.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its plant in Muskegon, Michigan, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C. December 9, 2003

APPENDIX A

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent's statement to an employee violated Section 8(a)(1) of the Act, but did not lay off employees in violation of Sections 8(a)(3) and (1) of the Act, as alleged.

PROCEDURAL HISTORY

This case began on March 18, 2003, when the Charging Party, William Russell, an individual, filed his initial charge in this proceeding. This charge alleged that Respondent, Paragon Pattern and Manufacturing Co., Inc., "controlled the outcome of a contract vote" in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On May 23, 2003, the Charging Party amended the charge. The amended charge alleged that on or about November 20, 2003, Respondent "laid off William Russell and other employees to prevent them from voting in a contract ratification vote."

On June 27, 2003, after investigation of the charge, the Regional Director for Region 7 of the National Labor Relations Board issued a complaint and notice of hearing, which I will call the "complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Respondent filed a timely answer to the complaint.

On November 4, 2003, hearing opened before me in Grand Rapids, Michigan. At the beginning of the hearing, the General Counsel amended paragraphs 9 and 10 of the complaint.

In the original complaint paragraph 9, the government alleged that about November 22, 2002, Respondent laid off employees James Visger, Bill Favel, Greg Van Hassell, and William Straley. The amendment deleted the names James Visger and Greg Van Hassell.

The original complaint paragraph 10, alleged that about November 25, 2003, Respondent laid off employees Richard Fairchild, James DeRuiter, and the Charging Party. The amendment deleted the name James DeRuiter.

The parties presented evidence on November 4 and 5, 2003, and gave oral argument on November 6, 2003. Today, November 7, 2003, I am issuing this bench decision.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ADMITTED ALLEGATIONS

Based on the admissions in Respondent's answer, I find that the General Counsel has proven the allegations raised in complaint paragraphs 1, 2, 3, 4, 5, 6, 7, 9, and 10. More specifically, I find that the Charging Party filed and served the charge and amended charge as alleged.

Additionally, I find that at all material times, Respondent was a corporation with an office and place of business in Muskegon Heights, Michigan, and that it was engaged in the manufacture of plastic, wood, and metal patterns. Further, I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act, and that it meets both the Board's statutory and discretionary jurisdictional standards. Also, I find that at all material times, Respondent's president, Lawrence Dorato, and its plant superintendent, Jack Cunningham, have been Respondent's supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Additionally, I find that at all material times, Local Lodge PM 2848, International Association of Machinists and Aerospace Workers, AFL–CIO, which I will call the "Union," has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent has admitted, and I find, that on about November 22, 2002, it laid off employees Bill Favel and William Straley, and that on about November 25, 2002, it laid off employees Richard Fairchild and William Russell. However, Respondent denies that it did so for the unlawful reasons alleged in complaint paragraphs 11, 12, and 13.

BACKGROUND

Respondent produces patterns for automobile makers such as General Motors. In recent years, Respondent and other pattern makers in the United States have faced increasing competition from similar companies in other countries.

Moreover, some automobile manufacturers have adopted an online "reverse auction" procedure which encourages pattern makers to underbid one another. Both Respondent and a local competitor have experienced severe financial problems. The record in this case provides a textbook example of management and union leaders working together to deal with these adverse economic conditions and thereby prevent the closing of the factory and the consequent loss of jobs.

The Union represents Respondent's journeyman and apprentice pattern makers. In 1999, Respondent and the Union entered into a 4–year collective–bargaining agreement which expires on May 31, 2004. About halfway through the contract term, Respondent asked the Union to reopen the contract and grant concessions.

The record indicates that the Union did grant concessions in about January 2002, but that these initial concessions were not sufficient to keep Respondent from operating at a loss. Therefore, Respondent went back to the Union to request further concessions.

On April 16, 2002, the local Union's directing business representative, Jon B. Winterhalter, sent Respondent's president a letter asking for detailed financial records. Respondent provided these records, which Winterhalter sent to a team of financial analysts working for the International Union. After the analysts confirmed that Respondent was in serious financial distress, and might go out of business absent relief, Winterhalter sent Respondent another letter expressing the Union's willingness to discuss contract modifications.

Respondent and the Union engaged in negotiations, but the resulting concessions would not take effect until ratified by employee vote. On three separate occasions, employees rejected the proposed concessions. After the first two votes, Respondent and the Union negotiated further to make the concessions more palatable to the employees. The third vote took place on November 21, 2002.

As customary, an employee meeting took place before the third vote. Respondent's president, Lawrence Dorato, spoke to the employees and answered questions. Then, Dorato and other supervisors left, leaving the employees with their union representatives.

In each of the three elections, the Union reported the outcome of the vote to management but did not disclose the margin. Additionally, the Union did not inform Respondent how any particular employee voted. Indeed, the Union did not have that information because the employees voted by secret ballot.

Immediately after the employees rejected concessions for the third time, neither the Respondent nor the Union sought to engage in more negotiating. Based on the credited testimony, I conclude that Respondent's owners, including President Dorato, believed that the company would have to close.

The record does not indicate that Respondent's board of directors resolved to shut down the plant or close the business, and the General Counsel argues that Respondent had not made a firm decision to do so. The General Counsel notes, for example, that in its correspondence, Respondent stopped short of announcing a plant closing and simply alluded to that possibility.

However, Respondent had not completed all the work it had contracted to perform, and Respondent's management did not wish to alarm customers by announcing the plant closing immediately. Therefore, I do not believe that Respondent's failure to make a clear and unequivocal statement about plant closing establishes any lack of certainty.

In this regard, I place considerable weight on the testimony of Union Representative Jon Winterhalter. According to Winterhalter, Union analysts who examined Respondent's financial documents informed him very clearly that this was "definitely a case" in which the company would go out of business in the absence of concessions.

Based on his demeanor as a witness, I have confidence in Winterhalter's testimony, which I credit. Moreover, the Union's willingness to reopen a collective–bargaining agreement mid–term and negotiate concessions provides convincing evidence that the Union took the opinion of its analysts very seriously. Union officials obviously would require convincing proof of financial distress before taking such a drastic step. They clearly believed that Respondent's business was moribund, and the record provides little basis to question this conclusion.

Therefore, I conclude that after Respondent's employees rejected the proposed concessions for the third time, Respon-

dent's management, including President Dorato, believed that Respondent would be closing the plant. As a first step, management decided to discontinue the third shift.

THE ALLEGED UNFAIR LABOR PRACTICES

As Respondent has admitted, it laid off certain employees on Friday, November 22, 2002—the day after the employees voted for the third time to reject the concessions – and it laid off some more employees on Monday, November 25, 2002. The government alleges that some, but not all, of these layoffs violated Section 8(a)(1) and (3) of the Act. Complaint paragraphs 9 through 13 raise these allegations.

The government also alleges that Respondent, by its President Dorato, violated Section 8(a)(1) on about November 22, 2002, by threatening employees with reprisals because of their opposition to contract concessions and threatening employees who failed to support the contract concessions with loss of employment. Complaint paragraph 8 raises this allegation.

COMPLAINT PARAGRAPH 8

As already stated, after employees voted for the third time to reject the proposed concessions, management decided to eliminate the third shift. The government does not allege that Respondent made this decision for any unlawful reason, and I conclude that Respondent did so for lawful economic reasons. On November 22, 2002, one of the third shift employees, Bill Favel, talked with Respondent's President Dorato about the layoff.

According to Favel, at 7:30 a.m., when the third shift ended, he learned about his layoff and asked Dorato if he needed to stick around that weekend. Favel lived some distance from the plant and, as I understand his question, he wanted to know whether he might need to drive back to vote again on a concessions package. However, at that point, neither the Respondent nor the Union contemplated either more bargaining about concessions or further votes.

Favel testified that Dorato answered his question by saying "I had decided my fate, my future was set, myself and the guys that didn't want to help were out of here."

Based on my observations of the witnesses, I conclude that Dorato is a more credible witness than Favel and resolve conflicts in their testimony by crediting Dorato. However, Dorato's testimony generally corroborates Favel's on this point.

On direct examination, Dorato testified, in part, "I was upset, probably said some things I shouldn't have said out of context, but the context was 'you guys,' meaning 'you guys that voted this thing down,' that it's, it's too bad."

In response to my question, Dorato did not deny telling Favel that "you and the guys who don't want to help are out of here." However, he explained what he meant by that statement: "I

said [it] in the context that you, meaning the people that didn't vote for it, are, we're all out of here, meaning that we're out of here."

In determining whether a supervisor's statement to an employee constitutes an unlawful threat, the Board applies an objective standard, focusing on what an employee reasonably would understand the words to mean. Therefore, I must judge Dorato's words not by what he intended to communicate but by the message the words reasonably would convey.

As Dorato acknowledged, when he referred to the "guys who didn't want to help," he meant the employees who voted against the proposed concessions. The words reasonably would be understood in this way.

When Dorato said that the "guys who didn't want to help" would be "out of here," an employee reasonably would understand the message to be that those who voted against the concessions would be laid off. Because Section 7 of the Act protects an employee's right to vote against concessions, Dorato's words reasonably communicate that Respondent would retaliate against employees for engaging in protected activity. Therefore, I recommend that the Board find that this statement violates Section 8(a)(1) of the Act.

COMPLAINT PARAGRAPHS 9 AND 10

Respondent has admitted that on November 22 and 25, 2002, it laid off the employees named as discriminatees in complaint paragraphs 9 and 10. However, it denies that it laid off these employees for the unlawful reasons alleged later in the complaint.

In evaluating these allegations, I will use the framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

The General Counsel clearly has established that the four alleged discriminatees engaged in the protected activity of speaking against the concessions which Respondent's management considered necessary to survival of the company. Therefore, I find that the evidence satisfies the first *Wright Line* element.

The record also establishes that Respondent was aware that the alleged discriminatees opposed the concessions. In some instances, these employees voiced their opposition at meetings attended by management, notably Respondent's President Dorato.

Employee Richard Fairchild credibly testified that he spoke against the concessions to other employees in the lunchroom. Additionally, Fairchild testified without contradiction that one of the owners, Pete Price, had asked him what he thought about the proposed concessions and that Fairchild had replied that he didn't think the company would get the concessions. Fairchild also told Price that the employees "didn't have a lot of faith" in Respondent's president Dorato and that Fairchild didn't see

how the employees would agree to any concessions, considering the company's present management.

Fairchild quoted Price as replying that if Fairchild had any more concerns about the company, that Price wanted Fairchild to talk to Price "and him only." Price did not testify. Based on Fairchild's uncontradicted testimony, I conclude that Respondent was aware that he had expressed opposition to the concessions in discussions with other employees.

Employee William Favel also testified that he spoke with owner Pete Price about the concessions. However, Favel's testimony was not very specific. Nonetheless, I conclude that Respondent was aware that Favel opposed the concessions.

Employee William Straley spoke out at meetings attended by management officials. He advocated the adoption of an employee stock ownership plan, or ESOP, as an alternative to concessions. Therefore, I find that management was aware of Straley's opposition to the concessions.

Additionally, I find that the Charging Party, William Russell, expressed his opposition to the concessions in a way conspicuous enough to come to the attention of management. Therefore, I conclude that the government has established the second *Wright Line* element for all four of the alleged discriminatees.

Clearly, a layoff is an adverse employment action. Therefore, I find that the General Counsel has established the third *Wright Line* element.

Finally, the government must show a nexus between the employees' protected activities and the adverse employment action. In looking for such a connection, I will consider first the 8(a)(1) violation.

It is well established that a statement which violates Section 8(a)(1) also constitutes evidence of unlawful motive. However, when considering such a statement as evidence of motive, I must take into account not only what the statement reasonably would communicate under an objective standard—the test for an 8(a)(1) violation—but also what the speaker actually meant.

For example, an employer can violate Section 8(a)(1) by conveying the message that employees' protected activity resulted in particular harm even if that is not the case. To take an extreme hypothetical example, an employer arguably could violate Section 8(a)(1) by claiming that some event outside its control, such as a tornado destroying a plant, had occurred because employees had engaged in union or other protected activities. If such a statement reasonably and plausibly would be understood to link the protected activity with the subsequent harm, it would violate Section 8(a)(1) even if untrue. But although such a statement still would be evidence of hostility towards employees engaged in protected activity, it would not mandate a conclusion that an employer had unlawfully laid off workers in retaliation for their protected activities. In other words, the statement alone would not overcome persuasive evidence that a force beyond the employer's control had been responsible for the layoffs.

The credited evidence establishes, and I find, that when Dorato made the violative statement, he believed that the plant was going to close because the employees had voted down the concessions. The employees who opposed the concessions would be affected by the closing, but so would the employees who favored them.

When he made the violative statement, Dorato was upset and bitter. I conclude that he intended to say, in effect, "Now look what you've done!" He believed that the employees who opposed the concessions would suffer from their action, as would the employees who had favored them.

In my view, Dorato's intemperate statement falls short of establishing that management selected the employees for the initial layoff based on whether or not they had opposed the concessions. Nonetheless, to establish the fourth element of the *Wright Line* test, the government must only establish some kind of link, not a proximate cause. I conclude that Dorato's statement is sufficient to establish such a nexus.

Therefore, the General Counsel has carried the burden of proving the four *Wright Line* elements. The burden thus shifts to Respondent to demonstrate that it would have laid off the employees in any event.

The General Counsel notes that when Respondent laid off the alleged discriminatees, it gave them layoff slips which did not have a "return to work" date. Under established Union rules, a laid off employee could not vote on the concessions unless the employee's layoff slip had a return–to–work date.

However, I do not agree with the General Counsel's argument that the absence of a return–to–work date demonstrates that Respondent was trying to prevent the laid off employees from voting against the concessions. At the time the employees received these layoff slips, they had already taken part in 3 votes on the concessions and neither Respondent nor the Union contemplated any further vote.

Only later did the Union propose a compromise which led to a fourth vote, at which a majority of the employees did agree to the concessions, thus keeping the Respondent's business viable, at least for a while. However, at the time Respondent gave out the layoff slips on November 22 and 25, 2002, management did not know there would be another vote. To the contrary, I find that management did not believe there would be another vote, and that was the reason for Dorato's despair and bitterness.

The General Counsel also elicited testimony to show that at least some of the alleged discriminatees were excellent employees and had not been laid off often in the past. The government argues that these employees would not have been laid off except for their protected activities.

However, Respondent began by laying off the entire third shift. Moreover, as the government concedes, Respondent not only laid off the alleged discriminatees but also laid off other employees at the same time.

The General Counsel asserts that under established Board precedent, the fact that a Respondent lays off individuals who did not engage in protected activity along with those who did does not establish that Respondent did not discriminate. That is certainly true. In many such cases, where an employer lays off employees who did not engage in protected activity as a "smoke screen" to cover up its discrimination against employees who did, the government will seek reinstatement of all the injured employees. That is not the case here.

The entire record, including the persuasive testimony of Union Representative Winterhalter, establishes that Respondent was in financial extremis. Moreover, it is clear that when Respondent laid off employees on November 22 and 25, 2002,

management believed these to be only the first of the layoffs which would take place in closing the plant.

Respondent articulated persuasive reasons for the selection of the employees laid off on those dates. Elimination of the third shift was certainly a logical way to go about shutting down the operation a shift at a time.

Moreover, Dorato credibly testified that management selected two of the alleged discriminates—Russell and Fairchild—for layoff because they had worked long enough to retire. In Dorato's experience, employees who became eligible to retire often did so with little notice to the company.

Dorato, who was a credible witness, thus articulated a business reason for selecting these employees for layoff that was unrelated to their protected activities. Whether or not this reason implicates Title VII of the Civil Rights Act of 1964 is not before me. In any event, the reason does not transgress the National Labor Relations Act.

Finding that Respondent selected the employees for layoff for the reasons given by Dorato, I conclude that Respondent has carried its burden of showing that it would have laid off the four alleged discriminatees in any event, regardless of their protected activity. Therefore, I recommend that the Board dismiss the 8(a)(3) allegations.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order, and Notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, Counsel demonstrated a high level of professionalism and civility which I truly appreciate. The hearing is closed.

BENCH DECISION

JUDGE LOCKE: On the record.

This decision is issued pursuant to Section 102.35(e)(10) and Section 102.45 of the Board's Rules and Regulations.

I find that Respondent's statement to an employee violated Section 8(a)(1) of the Act; that Respondent did not lay off employees in violation of Sections 8(a)(3) and (1) of the Act as alleged.

PROCEDURAL HISTORY

This case began on March 18, 2003, when the Charging Party, William Russell, an individual, filed his initial charge in this proceeding. This charge alleged that Respondent, Paragon Pattern and Manufacturing Company, Inc., "controlled the outcome of a contract vote" in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

THE ACT

On May 23rd, 2003, the Charging Party amended the charge. The amended charge alleged that on or about November 20, 2003, Respondent "laid off William Russell and other employees to prevent them from voting in a contract ratification vote."

On June 27th, 2003, after investigation of the Charge, the Regional Director for Region 7 of the National Labor Relations Board issued a Complaint and Notice of Hearing which I will call the Complaint.

In issuing this Complaint, the Regional Director acted on behalf of the General Counsel at the Board whom I will refer to as the General Counsel or as the Government.

Respondent filed a timely Answer to the Complaint.

On November 4, 2003, hearing opened before me in Grand Rapids, Michigan. At the beginning of the hearing, the General Counsel amended paragraphs 9 and 10 of the Complaint.

In the original Complaint, paragraph 9, the Government alleged that about November 22, 2002, Respondent laid off employees James Visger, Bill Favel, Greg Van Hassel and William Straley. The amendment deleted the names James Visger and Greg Van Hassel.

The original complaint, paragraph 10, alleged that about November 25th, 2003, Respondent laid off employees Richard Fairchild, James DeRuiter and the Charging Party. The amendment deleted the name James DeRuiter.

The parties presented evidence on November 4 and 5, 2003, and gave oral argument on November 6, 2003. Today, November 7, 2003, I am issuing this bench decision.

ADMITTED ALLEGATIONS

Based on the admissions in Respondent's Answer, I find that the General Counsel has proven the allegations raised in Complaint paragraphs 1, 2, 3, 4, 5, 6, 7, 9 and 10.

More specifically I find that the Charging Party filed the charge and amended the charge as alleged. Additionally I find that at all material times Respondent was a corporation with an office and place of business in Muskegon Heights, Michigan, and that it is engaged in the manufacture of plastic, wood and metal patterns.

Further, I find that at all material times Respondent has been an Employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act and that it meets both the Board's statutory and discretionary jurisdictional standards. Also, I find that at all material times Respondent's president, Lawrence Dorato, and its plant superintendent, Jack Cunningham, have been Respondent's supervisors and agents within the mean of Sections 2(11) and 2(13) of the Act respectively.

Additionally, I find that at all material times Local Lodge PM2848, International Association of Machinists and Aerospace Workers, AFL-CIO, which I will call the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

Respondent has admitted, and I find, that on about November 22, 2002, it laid off employees Bill Favel and William Straley, and that on about November 25, 2002, it laid off employees Richard Fairchild and William Russell.

However, Respondent denies that it did so for the unlawful reasons alleged in Complaint paragraphs 11, 12 and 13.

BACKGROUND

Respondent produces patterns for automobile makers such as General Motors. In recent years, Respondent and other pattern makers in the United States have faced increasing competition from similar companies in other countries. Moreover, some automobile manufacturers have adopted an online reverse auc-

tion procedure which encourages pattern makers to under bid one another.

Both Respondent and a local competitor have experienced severe financial problems. The record in this case provides a textbook example of management and union leaders working together to deal with these adverse economic conditions and thereby prevent the closing of the factory and the consequent loss of jobs.

The Union represents Respondent's journeymen and apprentice pattern makers. In 1999 Respondent and the Union entered into a four-year collective bargaining agreement which expires on May 31, 2004.

About halfway through the contract term, Respondent asked the Union to reopen the contract and grant concessions. The record indicates that the Union did grant concessions in about January, 2002, but that these initial concessions were not sufficient to keep Respondent from operating at a loss. Therefore, the Respondent went back to the Union to request further concessions.

On April 16, 2002, the Local Union's directing business representative, John B. Winterhalter, sent Respondent's president a letter asking for detailed financial records. Respondent provided these records which Winterhalter sent to a team of financial analysts working for the International Union.

After it was confirmed that Respondent was in serious financial distress and might go out of business absent relief, Winterhalter sent Respondent another letter expressing the Union's willingness to discuss contract modifications. Respondent and the Union engaged in negotiations but the resulting concessions would not take effect until ratified by employee vote.

On three separate occasions, employees rejected the proposed concessions. After the first two votes, Respondent and the Union negotiated further to make the concessions more palatable to the employees.

The third vote took place on November 21, 2002. As is customary, an employee meeting took place before the third vote. Respondent's president, Lawrence Dorato, spoke to the employees and answered questions. Then Dorato and other supervisors left, leaving the employees with their Union representatives.

In each of the three elections, the Union reported the outcome of the vote to management but did not disclose the margin. Additionally, the Union did not inform Respondent how any particular employee voted. Indeed, the Union did not have that information because the employees voted by secret ballot.

Immediately after the employees rejected concessions for the third time, neither the Respondent nor the Union sought to engage in more negotiating. Based on the testimony, I conclude that Respondent's owners, including President Dorato, believed that the Company would have to close.

The record does not indicate that Respondent's Board of Directors resolved to shut down the plant or close the business and the General Counsel argues that Respondent had not made a firm decision to do so.

The General Counsel notes, for example, that in its correspondence Respondent stopped short of announcing a plant closing and simply alluded to that possibility. However, Respondent had not completed all the work it had contracted to perform and Respondent's management did not wish to alarm customers by announcing the plant closing immediately. Therefore, I do not believe that Respondent's failure to make a clear and unequivocal statement about plant closing establishes any lack of certainty.

In this regard, I place considerable weight on the credited testimony of Union representative, John Winterhalter. According to Winterhalter, the Union analysts who examined Respondent's financial documents informed them very clearly that this was "definitely a case" in which the Company would go out of business in the absence of concessions.

Based on his demeanor as a witness, I have confidence in Winterhalter's testimony which I credit. Moreover, the Union's willingness to reopen a collective bargaining agreement midterm and negotiate concessions provides convincing evidence that the Union took the opinion of its analysts very seriously.

The Union officials obviously would require convincing proof of financial distress before taking such a drastic step. They clearly believed that Respondent's business was moribund and the record provides little basis to question its conclusion.

Therefore, I conclude that after Respondent's employees rejected the proposed concessions for the third time, Respondent's management, including President Dorato, believed that Respondent would be closing the plant. As a first step, management decided to discontinue the third shift.

THE ALLEGED UNFAIR LABOR PRACTICES

As Respondent has admitted, it laid off certain employees on Friday, November 22, 2002, the day after the employees voted for the third time to reject the concessions. And it laid off some more employees on Monday, November 25, 2002.

The Government alleges that some, but not all, of these layoffs violated Section 8(a)(1) and (3) of the Act. Complaint paragraphs 9 through 13 raise these allegations.

The Government also alleges that Respondent, by its President Dorato, violated Section 8(a)(1) on about November 22, 2002, by threatening employees with reprisals because of their opposition to contract concessions and threatening employees who failed to support the contract concessions with loss of employment. Complaint paragraph 8 raises this allegation.

COMPLAINT PARAGRAPH 8

It is already stated, after employees voted for the third time to reject the proposed concessions, management decided to eliminate the third shift. The Government does not allege that Respondent made this decision for any unlawful reason and I conclude that Respondent did so for lawful, economic reasons.

On November 22, 2002, one of the third shift employees, Bill Favel, talked with Respondent's President Dorato about the layoff. According to Favel, at 7:30 a.m. when the third shift ended he learned about his layoff and asked Dorato if he needed to stick around that weekend. Favel lives some distance from the plant and, as I understand his question, he wanted to know whether he might need to drive back to vote again on the concessions package.

However, at that point, neither the Respondent nor the Union contemplated either more bargaining about concessions or further votes. Favel testified that Dorato answered his question by saying, "I had decided my fate. My future was set. Myself and the guys that didn't want to help were out of here."

Based on my observations of the witnesses, I conclude that Dorato is a more credible witness than Favel and resolve conflicts in their testimony by crediting Dorato.

However, Dorato's testimony generally corroborates Favel's on this point. On direct examination, Dorato testified in part, "I was upset, probably said some things I shouldn't have said out of context but the context was, you guys, meaning you guys that voted this thing down, that it is too bad."

In response to my question, Dorato did not deny telling Favel that, "You and the guys who don't want to help are out of here."

However, he explained what he meant by that statement, "I said it in the context that you, meaning the people that didn't vote for it, all—were all out of here, meaning that we are all out of here."

In determining whether a supervisor's statement to an employee constitutes an unlawful threat, the Board applies an objective standard focusing on what an employee reasonably would understand the words to mean. Therefore, I must judge Dorato's words not by what he intended to communicate but by the message the words reasonably would convey.

As Dorato acknowledged, when he referred to the "guys who didn't want to help," he meant the employees who voted against the proposed concessions. The words reasonably would be understood in this way.

When Dorato said that the "guys who didn't want to help" would be "out of here," an employee reasonably would understand the message to be that those who voted against the concessions would be laid off.

Because Section 7 of the Act protects an employee's right to vote against concessions, Dorato's words reasonably communicate that Respondent would retaliate against employees for engaging in protected activity.

Therefore, I recommend that the Board find that this statement violates Section 8(a)(1) of the Act.

COMPLAINT PARAGRAPHS 9 AND 10

Respondent has admitted that on November 22 and 25, 2002, that it laid off the employees named as discriminatees in Complaint paragraphs 9 and 10. However, it denies that it laid off these employees for the unlawful reasons alleged later in the Complaint.

In evaluating these allegations, I will use the framework established by the Board in the *Wright Line*, 251 NLRB 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence.

First, the Government must show the existence of activity protected by the Act.

Second, the Government must prove that Respondent was aware that the employees had engaged in such activity.

Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action.

Fourth, the Government must establish a link or nexus between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 at 1089.

See, also, *Manno Electric, Inc.*, 321 NLRB 278, 280 at footnote 12 (1996).

The General Counsel clearly has established that the four alleged discriminatees engaged in the protected activity of speaking against the concessions which Respondent's management considered necessary to survival of the Company.

Therefore, I find that the evidence satisfies the first *Wright Line* element.

The record also establishes that Respondent was aware that the alleged discriminatees opposed the concessions. In some instances, these employees voiced their opposition at meetings attended by management, notably Respondent's President Dorato.

Employee Richard Fairchild credibly testified that he spoke against the concessions to other employees in the lunchroom. Additionally, Fairchild testified without contradiction that one of the owners, Pete Price, had asked him what he thought about the proposed concessions and that Fairchild had replied that he didn't think the Company would get the concessions.

Fairchild also told Price that the employees "didn't have a lot of faith" in Respondent's President Dorato and that Fairchild didn't see how the employees would agree to any concessions considering the Company's present management. Fairchild quoted Price as replying that if Fairchild had any more concerns about the Company that Price wanted Fairchild to talk to Price and him only.

Price did not testify. Based on Fairchild's uncontradicted testimony, I conclude that Respondent was aware that he had expressed opposition to the concessions in discussions with other employees.

Employee William Favel also testified that he spoke with owner Pete Price about the concessions. However, Favel's testimony was not very specific. Nonetheless, I conclude that Respondent was aware that Favel opposed the concessions.

Employee William Straley spoke out at meetings attended by management officials. He advocated the adoption of an employee stock ownership plan, or ESOP, as an alternative to concessions. Therefore, I find that management was aware of Straley's opposition to the concessions.

Additionally, I find that the Charging Party, William Russell, expressed his opposition to the concessions in a way conspicuous enough to come to the attention of management.

Therefore, I conclude that the Government has established the second *Wright Line* element for all four of the alleged discriminatees.

Clearly, a layoff is an adverse employment action.

Therefore, I find that the General Counsel has established the third *Wright Line* element.

Finally, the Government must show a nexus between the employees' protected activities and the adverse employment action.

In looking for such a connection, I will consider first the 8(a)(1) violation. It is well established that a statement which violates Section 8(a)(1) also constitutes evidence of unlawful motive.

However, when considering such a statement as evidence of motive, I must take into account not only what the statement reasonably would communicate under an objective standard, the test for an 8(a)(1) violation, but also what the speaker actually meant.

For example, an employer can violate Section 8(a)(1) by conveying the message that employees' protected activity resulted in particular harm even if that is not the case. To take an extreme hypothetical example, an employer arguably could violate Section 8(a)(1) by claiming that some event outside its control, such as a tornado destroying a plant, had occurred because employees had engaged in Union or other protected activities. Now such a statement reasonably and plausibly would be understood to link the protected activity with the subsequent harm and violate Section 8(a)(1) even if untrue.

On the other hand, such a statement would not support a finding that an employer had unlawfully laid off workers in retaliation for their protected activity if a force beyond the employer's control had destroyed the plant and made such layoffs necessary.

The credited evidence establishes and I find that when Dorato made the violative statement, he believed that the plant was going to close because the employees had voted down the concessions. The employees who opposed the concessions would be affected by the closing but so would the employees who favored them. When he made the violative statement, Dorato was upset and bitter.

I conclude that he intended to say, in effect, "Now look at what you have done." He believed that the employees who opposed the concessions would suffer from their action as would the employees who had favored them.

In my view, Dorato's intemperate statement falls short of establishing that management selected the employees for the initial layoff based on whether or not they had opposed the concessions.

Nonetheless, to establish the fourth element of the *Wright Line* test, the Government must only establish some kind of link, not approximate cause. I conclude that Dorato's statement is sufficient to establish such a nexus.

Therefore, the General Counsel has carried the burden of proving the four *Wright Line* elements. The burden must shift to Respondent to demonstrate that it would have laid off the employees in any event.

As General Counsel notes that when Respondent laid off the alleged discriminatees, it gave them layoff slips which did not have a return to work date. Under established Union rules, a laid off employee could not vote on the concessions unless the employee's layoff slip had a return to work date.

However, I do not agree with the General Counsel's argument that the absence of a return to work date demonstrates that Respondent was trying to prevent the laid off employees from voting against the concessions.

At the time the employees received these layoff slips, they had already taken part in three votes on the concessions and neither Respondent nor the Union contemplated any further vote. Only later did the Union propose to compromise which led to a fourth vote in which a majority of the employees did agree to the concessions, thus keeping Respondent's business viable, at least for a while.

However, at the time Respondent gave out the layoff slips on November 22 and 25, 2002, management did not know there would be another vote. To the contrary, I find that management did not believe there would be another vote and that was the reason for Dorato's despair and bitterness.

The General Counsel also elicited testimony to show that at least some of the alleged discriminatees were excellent employees and had not been laid off in the past. The Government argued that these employees would not have been laid off except for their protected activity.

However, Respondent began by laying off the entire third shift. Moreover, as the Government contends, the Respondent not only laid off the alleged discriminatees but also laid off other employees at the same time. The General Counsel asserts that under established Board precedent the fact that a respondent lays off individuals who did not engage in protected activity along with those who did does not establish that that respondent did not discriminate.

That is certainly true. In many such cases where an employer lays off employees who did not engage in protected activity as a smoke screen to cover up its discrimination against employees who did, the Government will seek reinstatement of all the injured employees.

That is not the case here. The entire record, including the persuasive testimony of Union Representative Winterhalter, establishes that Respondent was in financial distress. Moreover, it is clear that when Respondent laid off employees on November 22 and 25, 2002, management believed these to be only the first of the layoffs which would take place in closing the plant.

Respondent articulated persuasive reasons for the selection of the employees laid off on those dates. Elimination of the third shift was certainly a logical way to go about shutting down the operation a shift at a time.

Moreover, Dorato credibly testified that it selected two of the alleged discriminatees, that is Russell and Fairchild, for layoff because they had worked long enough to retire and in Dorato's experience employees who became eligible to retire often did so with little notice to the Company.

Dorato who was a credible witness thus articulated a business reason for selecting these employees for layoff that was unrelated to their protected activity. Whether or not this reason implicates Title 7 of the Civil Rights Act is not before me. In any event, the reason does not transgress the National Labor Relations Act.

For these reasons, I conclude that Respondent has carried its burden of showing that it would have laid off the four alleged

discriminatees in any event regardless of their protected activity.

Therefore, I recommend that the Board dismiss the 8(a)(3) allegations.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this Bench Decision. This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order and notice.

When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, counsel demonstrated a high level of professionalism and civility, which I truly appreciate.

The hearing is closed.

Off the record.

(Whereupon, on Friday, November 7, 2003, the hearing in the above-entitled matter was closed.)

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten employees with loss of employment or other reprisals because they opposed concessions we sought in collective bargaining with the Union.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

PARAGON PATTERN & MANUFACTURING CO., INC.